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IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-909

J. HOWARD SMITH, INC., J. H. BAKER & BRO. INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGLL, INC. and GLOUCESTER BY-PRODUCTS INC.,

*Petitioners,*

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Petitioners.*

**v.**

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 25, 1974 as modified on rehearing by order entered September 3, 1974.

### Opinions Below

The opinion of the District Court of the Southern District of New York has not been officially reported. It is printed in Appendix A hereto.

The opinion of the Court of Appeals as modified is reported at 501 F. 2nd 1275. It is printed in Appendix B hereto. The order of the Court of Appeals modifying its opinion on rehearing is printed at Appendix D hereto. The subsequent further modification of the opinion is also printed at Appendix D.

The order of the Court of Appeals denying rehearing in banc is printed at Appendix E hereto.

## Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the Judiciary Act, 28 U.S.C. Sec. 1333 which provides that district courts shall have original jurisdiction of any civil case of admiralty or maritime jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was made and entered July 25, 1974. The order of the Court of Appeals modifying its decision was made and entered September 3, 1974. Pending determination by the Court of Appeals of petitioners' application for a rehearing in banc, this court by order of Justice Thurgood Marshall dated Nov. 20, 1974 (printed at Appendix F) extended petitioners' time to petition for a writ of certiorari to January 1, 1975 and by further order of this court dated December 23, 1974 (printed at Appendix F), petitioners' time to petition for a writ of certiorari was extended to January 31, 1974. The Court of Appeals by order dated Dec. 24, 1974 denied petitioners' application for a rehearing in banc. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

## Questions Presented

1. In a case where goods in apparent good order and condition upon shipment are delivered in damaged condition, will the cargo owner be deprived of the *prima facie* effect afforded to the clean bill of lading as provided for by 46 U.S.C. 1303(4) and the cases decided thereunder in the following instances:

   a. Where it was *exceedingly probable* that the damage was due to an inherent defect or vice of the goods.

   b. Where the damage to the goods *may* be caused by an inherent defect or vice of the goods.

(c) Where the goods are of an *unstable* nature even if the damage was from an external cause.

(d) In no event until the carrier first establishes that the damage arose from an excepted cause under 46 U.S.C. 1304(2)(a) to (q).

2. Has a carrier, who having demanded, received and relied upon a certificate as to the condition of a certain shipment upon delivery to the vessel for carriage exercised due diligence to furnish a seaworthy vessel as to subsequently received cargoes, when it believes or urges that the certificate is incompetent to prove the shipment's actual good order and condition.

3. Do the provisions of 46 U.S.C. 182 and 46 U.S.C. 1304(2)(b) which exempt a carrier from liability excuse the carrier from exercising all reasonable efforts to prevent aggravation of damage upon discovery of the dangerous condition of a cargo, and also excuse the carrier from exercising all reasonable efforts to prevent damage to other cargoes.

4. Is the clearly erroneous doctrine as provided for in Federal Rules of Civil Procedure, Rule 52a applicable to a determination of negligence or to findings in a case in which the testimony and other evidence is substantially in documentary form, particularly where the trial court has made a finding of fact which is inconsistent with a fact which the parties have stipulated to in their pre-trial order.

**Statutes Involved**

| | | | |
|---|---|---|---|
| 28 U.S.C. 1254(1) | See | Appendix | G |
| 28 U.S.C. 1333 | " | " | " |
| 46 U.S.C. 182 | " | " | " |
| 46 U.S.C. 1303 | " | " | " |
| 46 U.S.C. 1304 | " | " | " |
| Federal Rules of Civil Procedure Rule 52(a) | " | " | " |

## Statement

The suit was brought by petitioners who were consignees of sixteen shipments of fishmeal which were loaded on board the S.S. MARANON at the Peruvian ports of Matarani, Callao, Huacho and Chancay (Pl. Ex. 1-7 Bills of Lading; Pl. Ex. 2-9 Bills of Lading 56a line 8 to 57a line 20).[1] The cargoes were destined for Baltimore. The respondent was fully familiar with the nature of the cargo. Accordingly, preshipment certificates showing the temperature, fat and moisture content, as well as the duration of pre-shipment storage were required for shipment. The respondent had had recent experience with the potential problems in the carriage of such cargoes, for a year earlier one of its vessels, the M.V. PUTUMAYO had had a fire in a cargo of fishmeal at the Canal Zone (434-441 Pl. Ex. 14). Indeed fishmeal is a principal export of Peru and the master of the MARANON had carried an infinite amount of such cargo (46 lines 3-22).

A certificate attesting to the pre-shipment ranges of temperature, fat and moisture content and pre-shipment storage of the Matarani cargo was delivered to the vessel at that port (58 lines 2-7; 443 Pl. Ex. 15). The vessel also obtained a similar certificate which was referred to in the Lawson survey report prepared at the request of respondent's agents (355 Pl. Ex. 10). It is not disputed that a "clean" bill of lading was issued by respondent for this cargo (351 Pl. Ex. 1) and "clean" bills of lading were also issued for each of the other cargoes taken on board at the subsequent ports. After the vessel departed from the last

1. References to pages in the Appendix on Appeal are designated by letter "a" following the page number. References to the Exhibit Volume are by page number alone.

port of loading and before she reached Balboa at the southern entrance of the Panama Canal overheating and fires were discovered by the ship's officers in the cargo which was loaded at Matarani, facts which were borne out by the respondent's records and to which the parties stipulated. (374 Pl. Ex. 11 log entry; 465 Def. Ex. A-1 Master's Radio Message; 466 Def. Ex. B-1 Master's Radio Message; 467 Def. Ex. C-1 Master's Radio Message; 468 Def. Ex. D-1 Master's Radio Message; 383 Pl. Ex. 12 Master's Protest; 25a Pre-Trial Order Stipulation). It is obvious from the decisions of the lower courts, both of which found that the fires first occurred after the vessel left the Canal Zone rather than before it arrived at the Canal, that the courts disregarded the records of the respondent and the stipulation of the parties. Upon arrival at Balboa the agent of the vessel's owners conferred with the ship's master who advised the agent that damage had occurred in the ship's main engine and that there had been overheating in the cargo; he denied however having had any fires (471 Def. Ex. F). The agent advised the owners of the condition of the cargo and also of the engine damage. The owners then instructed the master via the agent to protest the engine damage. He did so (462 Pl. Ex. 20-a) and at the same time filed a protest regarding the fires on board the vessel prior to reaching Balboa (383 Pl. Ex. 12). While in the Canal Zone and after an exchange of numerous communications concerning the condition of the cargo, the engine damage and the crew's demand for triple time for handling cargo (469, 470 Def. Ex. E-1; 471 Def. Ex. F; 472-474 Def. Ex. G-1; 475 Def. Ex. H; 476 Def. Ex. I-1; 477, 478 Def. Ex. J-1; 479, 480 Def. Ex. K-1; 481-483 Def. Ex. L-1) among the respondent, its agents and the master, the respondent directed the master to proceed to

the original port of destination, Baltimore. In accordance with those instructions at 8:00 o'clock in the evening of May 14, 1965, the vessel left Cristobal which is at the northern end of the Panama Canal (377 Pl. Ex. 11 Log). When the vessel had proceeded but one hour from that port renewed overheating was discovered in the cargo. The master radioed the vessel's owners informing them of this new occurrence (454 Pl. Ex. 18-b). Then at 8:00 o'clock in the morning of the following day the master radioed the respondent regarding another fire which had been discovered an hour earlier (455 Pl. Ex. 18b message 080015). Later, the same day he again radioed reporting the continuance of the fires and requested instructions (455 Pl. Ex. 18b Message 12015). Further messages were sent by the master to the owners on May 16, 17, and 18 (455-457 Pl. Ex. 18b; 485-490 Def. Ex. M-1). Finally, on May 18th, the vessel diverted to Savannah (491 Def. Ex. M-1) where the fire was extinguished by flooding the cargo holds. The voyage was abandoned and general average was declared by the owners. At no time during the voyage was any attempt made to control the overheating and fires other than by the shifting, and some jettisoning of cargo. The fire fighting equipment on the vessel which consisted of a $CO_2$ system (58a line 25 to 59a line 9) was never employed (48a Dist. Ct. Ap.). The District Court held for respondent on the ground that the provisions of the Carriage of Goods by Sea Act 46 U.S.C. Sec. 1304(2)(b) and of 46 U.S.C. Sec. 182 (generally referred to as the "Fire Statute") exempted the respondent from liability. In reaching its decision, the court found that the respondent (owner) was not at fault or in privity to the fires. Upon affirming the District Court, the Court of Appeals held that the conclusion of the lower court that the master re-

tained control of the ship was not clearly erroneous. Both lower courts have accepted the fact that the overheating and fires originated in the fishmeal which was loaded at Matarani, the first port of call. The District Court held that because of the nature of the cargo, the burden was on petitioners to establish the good order and condition of each cargo when it was delivered to the ship. The bills of lading, all of which were put in evidence, were held to be insufficient to establish such condition, although there was no proof that the overheating and fires were occasioned by an inherent vice in the cargo. Furthermore, it was not questioned that the cause of the damage to the fifteen non-Matarani shipments was the fire and overheating which had originated in the Matarani shipment. The District Court found the stowage and ventilation of the cargoes was adequate. The Court of Appeals affirmed these findings as not clearly erroneous. The Court of Appeals noted that the stowage though not perfect, reasonably complied with the accepted method of stowing such cargoes. The respondent's log book did not confirm the master's testimony that he continuously ventilated the cargo. On the contrary it showed no ventilation from April 25 when fishmeal loading commenced at Matarani (357 Pl. Ex. 11) until May 3rd at 4:00 A.M. (365 Pl. Ex. 11). Thereafter, no ventilation was recorded until May 9th at 6:00 A.M. (371 Pl. Ex. 11). Regular entries for ventilation were made in the ship's log thereafter (372-374 Pl. Ex. 11). Conversely the ship's logs report fires on May 12th and the master denied the existence of such fires. Neither of the lower courts made any finding as to whether or not the vessel's owners and/or the master were negligent in proceeding with the voyage with a damaged engine and carrying a cargo, part of which was in an unstable condition. Nor did either court make a finding as to whether or not the respondent and/or the

master were negligent in continuing the voyage to Baltimore instead of returning to Panama after further overheating, followed by new fires, was discovered within hours after sailing from that port. In its opinion the Court of Appeals suggested that petitioners had abandoned their argument that the vessel should not have proceeded with its engine in a damaged condition. On its petition for rehearing petitioners denied having done so. The District Court found that the master was not negligent in failing to use the $CO_2$ (the only fire fighting system on the vessel) because it might damage the cargo, and the Court of Appeals affirmed on the ground that the finding was not clearly erroneous. This finding was unsupported by the only evidence in this connection for the witness stated that $CO_2$ might cause condensation if improperly used (114a line 6 to 115a line 17). The master made no reference to condensation as a factor to be considered in employing $CO_2$. When asked why he didn't use the system he said it was because the holds were open and $CO_2$ is ineffective unless you close the holds (252 lines 1-7). The reason that he couldn't close the holds was because the hatch covers were being used to protect the damaged cargo that had been removed from the holds to the deck at the Canal Zone (255 lines 4-18; 258 lines 3-19).

Both lower courts held that the respondent was entitled to general average contribution from cargo. The District Court's conclusion was not supported by a necessary preliminary finding that neither the respondent nor its agents or employees were at fault with respect to the cargo damage. In an addendum to the decision filed after petitioners had applied for a rehearing and suggested that it be heard in banc, the Court of Appeals said that since there was testimony that the conduct of the captain and the crew mini-

mized the damage, it could not conclude that the lower court's finding was clearly erroneous. In making this additional finding upon which the affirmance was based, the Court of Appeals overlooked the fact that the testimony it relied upon related to crew activity which took place at Savannah, the port of refuge, rather than to activity which took place during the voyage prior to arrival at that port. (Comments in report of surveyor Wiley based upon his observation of the crew at Savannah Pl. Ex. 12—pp. 13-14 not reproduced in Exhibit Volume).

Except for the testimony of experts, substantially all of the evidence in this case was in the form of depositions and documents.

**Reasons for Granting the Writ**

During the course of the development in the Second Circuit of the rule of maritime law which is the subject of this petition, this Court has denied petitions for writs of certiorari in cases which raised the question of the propriety of that rule. The rule has now been given final expression in the decision of the Court of Appeals which is the subject of this petition, and its application places a construction on the Carriage of Goods by Sea Act which is inimical to the scheme and purpose of that Act. This decision makes a fundamental change that undermines the basic concepts of the law of admiralty and renders meaningless certain provisions that are essential to the structure of the Carriage of Goods by Sea Act. In view of the numerous and conflicting opinions as to the proper law to be applied, unless this court now resolves the confusion which has been engendered and states with finality the construction to be given to the Act, the continued lack of uniformity and the disruptive effect that the decision from which

petitioners seek to appeal will place maritime law in complete disarray that will have far reaching repercussions in international ocean commerce.

1. The lower courts have held that because the goods which constituted the cargoes were susceptible to an inherent vice, it was incumbent upon petitioners as part of their case to establish by evidence, independent of the "clean" bills of lading which were received from the carrier, that their respective cargoes were in good order and condition at the time of shipment regardless of whether there was any evidence that the damage which occurred during the voyage was in fact attributable to such vice. The Court of Appeals has specifically held that failure to offer such proof barred recovery by all petitioners including those whose cargoes were admittedly damaged by external causes. This holding represents the final step in the development of a rule which has been formulated by the courts in the Second Circuit. It was first expressed in *The Niel Maersk* 91 F. 2nd 932 (2nd Cir. 1937), cert. denied 302 U.S. 753, 58 S. Ct. 281, 82 L. Ed. 582. In that case the court found that damage to cargo was caused partly by an inherent vice which most probably existed in the cargo prior to shipment for which the carrier would not be liable, and partly by the carrier's negligence. It was held that before an apportionment of damages would be made, the shipper would have to prove the actual condition of the cargo at the time that it was received by the carrier. The Court was of the opinion that since the preshipment condition arose while the shipper had custody of the goods, he should be required to show the actual condition at the time of shipment, and on this basis the court distinguished the case from *Schnell* v. *The Vallescura* 293 U.S. 296, 55 S. Ct. 194, 79 L. Ed. 373 (1934). THE VALLESCURA also involved the problem of apportioning damages, however, in that case the carrier had custody of

the cargo when both of the contributing causes arose, that is, peril of the sea, for which the carrier was not responsible, and negligence for which the carrier was liable. In that case this court outlined the rules of maritime law governing cases which involve cargo loss or damage. In summary those rules provide that a shipper establishes his *prima facie* case by proving that goods delivered to the carrier in good order were outturned damaged. The carrier to avoid liability must then prove either that the damage resulted from an "excepted" cause for which it would not be responsible or that it exercised due diligence to prevent the harm. If the carrier establishes that the immediate cause of the damage was one of the "excepted" causes, the burden is then on the shipper to give evidence that the carrier was negligent. Where, however, both an "excepted" cause and the carrier's negligence contributed to the damage it is the carrier's obligation to apportion the damage between the two causes and failing to do so, the carrier will be held liable for the entire loss. Both THE NIEL MAERSK and THE VALLESCURA involved cases which arose before the enactment of the Carriage of Goods By Sea Act (hereinafter referred to as COGSA) 46 U.S.C. Section 1300 *et. seq.* (enacted 1936). The general scheme of COGSA followed the maritime law as outlined in THE VALLESCURA with the further provision that a bill of lading shall be *prima facie* evidence of the order and condition of the goods at the time of shipment. 46 U.S.C. Section 1303(4).

In 1947 the District Court for the Southern District of New York was again presented with a case involving damage to cargo arising from two causes, that is, inherent vice of the cargo and negligence of the carrier. *American Tobacco Company* v. *Katingo Hadjipatera* 81 F. Supp. 438, modified and affirmed 194 F. 2nd 449 (2nd Cir. 1951).

cert. denied 343 U.S. 978, 72 S. Ct. 1076, 96 L. Ed. 1370. However, unlike THE NIEL MAERSK, the case involved more than one cargo. The court found that the damage to the several shipments was attributable to the condition of a particular shipment in which the damage originated and that the condition existed at the time it was received by the carrier for shipment. As to that cargo the court applied the holding in THE NIEL MAERSK and barred recovery because of the shipper's failure to prove the actual condition of that cargo but the court refused to extend that holding to the other cargoes as to which it found the bills of lading sufficient to establish the shippers' *prima facie* case. The court then proceeded to make the following observations at page 446:

> "The Supreme Court has said that the carrier by sea who delivers in bad condition cargo that he had received in good condition has the burden of establishing every exception to his general liability: *Schnell* v. *The Vallescura* 1934, 293 U.S. 296, 55 S. Ct. 194, 79 L. Ed. 373. The weight of this burden was moderated when certiorari was denied, 1937, 302 U.S. 753, 58 S. Ct. 281, 82 L. Ed. 582, to review the Niel Maersk, 2 Cir. 1937, 91 F. 2d 932, in which it was held that the shipper must affirmatively establish the good condition at time of shipment of goods damaged by heating, where the carrier claimed the cause to have been inherent vice. This would suggest that whenever cargo damage could have been caused by internal defects, the shipper must disprove such defects in order to recover even if the carrier's failure to exercise due diligence in stowing or caring for the cargo may have caused or contributed to the damage: *The Niel Maersk, supra.* Contra *The Nichiyo Maru* 4 Cir. 1937, 89 F. 2d 539."

This broader expression of the rule of THE NIEL MAERSK was neither required by the facts under consideration nor was it supported by the assumed authority which the court found in this court's denial of certiorari in THE NIEL MAERSK. The Supreme Court has repeatedly stated that the denial of certiorari should not be considered as reflecting the views of the court as to the merits of the case or the significance of its holding. Cf. *Maryland* v. *Baltimore Radio Show* 338 U.S. 912, 917-920, 70 S. Ct. 252, 254-55, 94 L. Ed. 562, 565-66. Nevertheless, this interpretation has been accepted by the courts and thus THE KATINGO HADJIPATERA (supra) set the course for the rule which it ascribed to THE NIEL MAERSK. In following these two cases, the rule has been applied where inherent vice or internal defect *may* have been the cause of the damage. *Hecht, Levis & Kahn* v. *S.S. President Buchanan* 236 F. 2nd 627 (2nd Cir. 1956); *Lekas and Drivas Inc.* v. *Goulandris* 306 F. 2nd 426 (2nd Cir. 1962). But the courts have not been unmindful of the significance of the bill of lading. *Karabagui* v. *The Shickshinny* 123 F. Supp. 99, aff'd sub nom. *Kupfermann* v. *United States* 227 F. 2d 348 (2nd Cir. 1955). The courts have been equally concerned with the fact that "excepted" causes for which the carrier was not liable under general maritime law had been incorporated as defenses available to the carrier under COGSA 46 U.S.C. Section 1304(2) (a-p), including inherent defect, quality or vice of the goods 46 U.S. Section 1304(2)(m). In *American Tobacco Company* v. *Goulandris* 173 F. Supp. 140 (S.D.N.Y. 1959), aff'd 281 F. 2nd 179 (2nd Cir. 1960) the Court after referring to THE KATINGO HADJIPATERA and the interpretation which that case placed on THE NIEL MAERSK said at 175:

> "We have concluded that the ultimate burden of establishing that the tobacco cargo was free of in-

herent vice is upon the libelants if the tobacco is shown to have been damaged by heating of internal origin. The respondents have the burden of proving causal connection between an inherent vice and the damage (Section 4(2)(m) of the Act, 46 U.S.C.A. § 1304(2)(m). Thus, if the respondents prove that the heating damage to the tobacco was of internal origin, libelants have the burden of establishing the sound condition of the cargo when delivered to the vessel, i.e. that it was free of 'inherent defect, quality, or vice'. If libelants fail to sustain the burden, the respondents also have the burden of bringing themselves within the exemption of Section 4(2)(m) of the Act, and of establishing that the loss or damage sustained by the cargo arose or resulted from an 'inherent defect, quality or vice.' "

In *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind* 371 F. 2nd 537 (2nd Cir. 1967), the question was posed to the court as to whether *American Tobacco Co.* v. *Goulandris* 173 F. Supp. 140 at 175 (supra) expressed the rule of the Second Circuit. The court at page 539 footnote 2 refused to decide this point on the ground that such a determination was not required in that case. The question has now been answered in the negative by the decision of the Court of Appeals which is the subject of this appeal. In reaching this determination, the court has not only held that it is not necessary for the carrier to prove the causal connection between the "excepted" cause and the damage before the shipper is required to establish the condition of the cargo but has gone further and held that a bill of lading will not be sufficient to establish the shipper's case even if it is demonstrated that the cargo was damaged by external rather than internal causes. In so doing the court has overruled that part of the determination in *American Tobacco*

*Co.* v. *Katingo Hadjipatera,* (supra) which held that the bill of lading will establish the good order and condition of the goods when the damage resulted from external causes. The present decision effects a fundamental change in a basic rule of maritime law and imposes also a construction on COGSA that completely nullifies the provision in 46 U.S.C. seq. 1303(4) that a bill of lading shall be *prima facie* evidence of the order and condition of the goods at the time of shipment.

2. The rule as propounded by the courts of the Second Circuit has been either rejected or limited in its application by the courts in the following circuits:

*Fourth Circuit:*

*Brown & Williamson Corp.* v. *the S.S. Anghyra* 157 F. Supp. 737, mod. on other grounds sub. nom. *Hellenic Lines Ltd.* v. *Brown & Williamson Corp.* 277 F. 2nd 9 (4th Cir. 1960), cert. denied 364 U.S. 879, 81 S. Ct. 168, 5 L. Ed. 2nd 102. The district court stated the rule of the Fourth Circuit to be that where a cargo when loaded on a vessel was in "apparent good order and condition", the burden rests upon the carrier to explain the cause of the damage or in the alternative, to show freedom from negligence citing *The Nichiyo Maru* 89 F. 2nd 539 (4th Cir.) (157 F. Supp. 737 at 748).[2] Then at 749, the court makes reference to the Second Circuit rule and concludes that the theory adopted by that circuit infers that the carrier's burden of proof when it claims that damage comes within the "catch-all" exception of 46 U.S.C. Sec. 1304(2)(q) does not apply to the carrier when the "inherent vice" exception of 46 U.S.C. 1304(2)(m) is involved. See also *Samincorp. South American Min. & Mer. Corp.* v. *S.S.*

2. The Nichiyo Maru is cited improperly in the District Court decision.

*Cornwall* 240 F. Supp. 327, 329 (D.C. Md. 1963) wherein the District Court reiterated that a conflict exists among circuits with respect to the *prima facie* effect to be given to a clean bill of lading when the carrier contends that cargo damage arose from inherent vice.

*Fifth Circuit:*

In *United States* v. *Central Gulf Steamship Corporation* 340 F. Supp. 473 (E.D. La. 1972) at 480 the Court discusses the question of the burden of proof under COGSA and concludes that the rule formulated by the decisions of the Second Circuit is not in accord with the decisions in the Fifth Circuit.

*Ninth Circuit:*

In *States Marine Corp. of Del.* v. *Producers Coop. Packing Co.* 310 F. 2nd 206 (9th Cir. 1962) the Court of Appeals incorporated the opinion of the trial court in its decision. The District Court had held that the shipper may rely on the bill of lading as evidence of the condition of the cargo, unless there is an affirmative showing of inherent vice in the goods which might have caused the damage, or there is no evidence of negligence on the part of the carrier and the possibility of concealed vice in the goods is "very strong." However, when there is evidence of negligence and no substantial evidence to rebut the shipper's *prima facie* showing of good order and condition, the shipper need to go no further. Upon rehearing the Court of Appeals refused to pass on the question of whether the rule of the NIEL MAERSK can be applied in cases where there is evidence of carrier's negligence contributing to or enhancing the damage, citing Knauth on Ocean Bills of Lading (3rd Printing 1947) p. 150 and Gilmore and Black, The Law Of Admiralty p. 151.

3. In the course of evolving its rule the Second Circuit courts have become more concerned with effect (overheating, fire, spoilage, etc.) than with cause (inherent defect or vice). In THE NIEL MAERSK (supra) the court found that the overheating was *most probably* due to the internal condition of the cargo. In *American Tobacco Company* v. *Goulandris* (supra) the Court found that the carrier had exercised due care in handling and stowing the cargo, and that the cargo in which the overheating originated was susceptible to such damage because of its inherent qualities. The courts then extended the application of the rule to cover instances where the damage *may* have been caused by the internal condition of the cargo. However, at no time prior to the present case, did any court indicate that the rule would apply to a shipper whose cargo was shown to have been damaged only by external causes. It is submitted that the better approach to the problem is the one recommended in Gilmore and Black, The Law of Admiralty (1957) 147 Sec. 3-38 and 162 Sec. 3-43. The conclusion of the authors is in conformity with the rules of maritime law as outlined in THE VALLESCURA (supra). See also Carver, Carriage by Sea (12th Ed. 1971) Vol. 1 page 15 Sec. 16.

The decision of the Court of Appeals which is the subject of this petition has set the NIEL MAERSK doctrine as finally evoked on a collision course with other circuits, with the COGSA itself and with respected authors in the maritime field. Ocean carriers invariably plead all the defenses of 46 U.S.C. seq. 1304(2)(a-p). Considering that numerous cargoes of various types must be affected, the need for uniformity in the interpretation of COGSA is imperative. Many of these cargo claims involve substantial amounts. The present case alone concerns a loss of cargo in excess of $200,000.00 and a counterclaim of over $95,000.00. Furthermore, if the decision of the Court of Appeals is permitted to stand, it will undoubtedly have a substantial effect

on the determination of cases involving the order and condition of containerized shipments. This problem has been dealt with to some extent in *Sperry Rand Corp.* v. *Norddeutcher Lloyd* 1973 A.M.C. 1392 (S.D.N.Y. 1973) and *M. Parquet & Co.* v. *Dart Containerline Co. Ltd.* 1973 A.M.C. 926 (Civ. Ct. N.Y. Co. 1973) 74 Misc. 2nd 352, 343 N.Y.S. 2nd 446; see also *Leather's Best Inc.* v. *S.S. Mormaclynx* 313 F. Supp. 1373, 1380 aff'd 451 F. 2nd 800 (2nd Cir. 1971).

It is respectfully submitted that the question presented upon this petition as to the proper rule of maritime law and the construction to be given to COGSA has ripened to a point that requires settlement of the conflict among the Circuits and the formulation of a uniform rule by this Court.

4. If the better approach referred to in point 3 supra had been adopted in the case at bar, the respondent would have been required to show that it had used due diligence in furnishing a seaworthy vessel and that it properly cared for the cargoes, since there was no evidence presented to establish that the overheating and fire in the cargo loaded at the port of Matarani was caused by its inherent vice or defect. The lower courts held that neither the Matarani bill of lading nor the fifteen similar bills of lading subsequently issued by the respondent had any significance. The courts refused to consider the certificate attesting to the condition of the Matarani cargo even though the certificate was required by respondent before it would accept the goods for carriage. Nor was any weight given to the certificate which the respondent itself had obtained and which also certified that the goods were in proper condition for shipment. Yet respondent must have relied on these certificates when the cargoes were received at the subsequnt ports, for there was no other showing that the Matarani cargo was in

a safe condition. Due diligence with respect to the vessel's seaworthiness must be exercised as of the time each cargo is received and the vessel must be seaworthy at such time. *Mississippi Shipping Co.* v. *Zander and Company* 270 F. 2nd 345, 350 (cases cited) (5th Cir. 1959); *The Southwark* 191 U.S. 1, 13, 24 S. Ct. 1, 6, 48 L. Ed. 65, 71 (1903). Seaworthiness requires that the cargo be in a safe condition. *Accinanto, Limited* v. *Cosmopolitan Shipping Co.* 99 F. Supp. 261, 265 (D.C. Md. 1951), modified on other grounds sub. nom. A/S j. *Ludwig Mowinckels Rederi* v. *Accinanto, Limited* 199 F. 2nd 134 (4th Cir. 1952), cert. denied 345 U.S. 992, 73 S. Ct. 1129, 97 L. Ed. 1400; *The Southwark* (supra); *Gutierrez* v. *Waterman Steamship Corp.* 373 U.S. 206, 213, 83 S. Ct. 1185, 1190, 10 L. Ed. 2nd 297, 303 (1963); *Carver, Carriage by Sea* (12th Ed.) Vol. 1 page 95 Sec. 108. If respondent relied on the certificates as justification for receiving the other cargoes without first verifying the actual condition of the Matarani cargo, then respondent cannot at trial reject the certificates as meaningless. *Leather's Best Inc.* v. *S.S. Mormaclynx* 313 F. Supp. 1373 (supra), 1380; *Louisville & Nashville R.R. Co.* v. *Knox Homes Corp.* 343 F. 2nd 887, 896 (5th Cir. 1965). Respondent having previously carried similar cargoes was fully familiar with the properties and propensities of the cargo it was carrying. The master said he was experienced in the care and handling of such cargo and that he had been trained in the use of the $CO_2$ fire fighting system. There was no evidence of inspection of the cargo after the ship departed from Matarani. There were no entries in the ship's logs of temperature or ventilation (with one exception) until both matters were routinely recorded during the latter stages of the voyage. The absence of a log entry has been taken as proof that an event subsequently reported never in fact occurred. *Nichimen Company* v. *M.V. Farland* 333 F. Supp. 691, aff'd. 462 F. 2nd 319 (2nd Cir. 1972); *Peter Paul, Inc.* v. *The M.S.*

*Christer Salen* 152 F. Supp. 410, aff'd sub. nom. *Peter Paul, Inc.* v. *Rederi A/B Pulp*, 258 F. 2nd 901 (2nd Cir. 1958), cert. denied 359 U.S. 910, 79 S. Ct. 586, 3 L. Ed. 2nd 574. The master did testify that he started ventilation immediately after loading at Matarani, but he also testified that no fires occurred before the vessel reached the Canal Zone. His own messages as well as his log entries contradict him. Such testimony standing alone does not constitute sufficient evidence that proper precautions were taken to make certain that the ship was in a safe condition at the time the next cargo was loaded. If the lower courts had not relied upon the rule of the Second Circuit, it is clear that respondent had not sustained the burden of proving that the damage was attributable to an inherent condition of the Matarani cargo, or that it had not been negligent in the care of the cargo. *The Vallescura* (supra). There was no more ground for assuming that the overheating and fire was due to the condition of the cargo, than there was to assume that the damage was not caused through the fault of respondent. If the Court of Appeals had not extended the application of THE NIEL MAERSK rule, there was no basis whatsoever for sustaining the trial court's decision as to the fifteen non-Matarani cargoes.

5. The trial court held that respondent was not in control of the vessel at the time the fires occurred and therefore respondent was relieved of liability by the provisions of 46 U.S.C. Sec. 182 and COGSA 46 U.S.C. Sec. 1304(2)(b). The determination was based on the unsupported testimony of the master when he was deposed at a pretrial examination. It cannot be disputed that the master was an interested witness and his testimony standing alone can hardly be considered of sufficient weight to overcome the other evidence which demonstrated that respondent had intervened, and that the master acted only after receiving instructions from respondent. Before the vessel reached Balboa the

master had radioed respondent reporting overheatings and fires in the cargo and requested respondent's instructions. Prior to the vessel's arrival at the port, respondent had also been apprised of the damage to the ship's engine. Respondent directed its agent to investigate. Messages were then exchanged among the master, the agent and respondent which made it clear that the parties concerned understood that the decision as to the procedure to be followed rested with respondent. Then, having full knowledge of the condition of the ship and her cargo, respondent directed the master to resume the voyage to the original port of destination, Baltimore. In view of the position which respondent has taken regarding the certificates which were issued for the Matarani cargo it follows that the respondent had not exercised due diligence to provide a seaworthy vessel as to the subsequently lifted cargoes. The protection of the "Fire Statute" 46 U. S. Sec. 182 and COGSA 46 U. S. C. Sec. 1304 (2) (b) is not available to a carrier which has failed to exercise due diligence to make its vessel seaworthy. *Asbestos Corp. Ltd., et al.*, v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre et al.*, 480 F. 2nd 669, 672 (2 Cir. 1973). The subsequent intervention by respondent at the Canal Zone, and its direction that the voyage be resumed knowing that the vessel could not maintain her speed and that the condition of the cargo presented an imminent danger, also barred respondent from claiming this defense. *May* v. *Hamburg Etc. Gesellschaft* 290 U.S. 333, 346 (1933), 54 S. Ct. 162, 165, 78 L. Ed. 348, 353; *Gesellschaft Fur Getreidhandel A/G* v. *S.S. Texas* 318 F. Supp. 599 (E.D. La. 1970). However, the Court of Appeals refused to set aside the findings of the trial court on the ground that they were not clearly erroneous, although the provisions of the rule, F.R.C.P. 52(a) were not applicable since the evidence presented was substantially in the form of depositions and documents. *J. Gerber & Co.* v. *S.S. Sabine Howaldt* 437 F. 2nd 580 (2 Cir. 1971). If

the Appellate Court had not considered itself bound by that rule, it might well have found that the preponderance of evidence was against respondent.

6. In addition to providing a seaworthy vessel, a carrier is also required to exercise proper care in loading, stowing, carrying and discharging cargo. This obligation under COGSA 46 U. S. C. Sec. 1303 (2) continues throughout the voyage. It includes the prevention of aggravation of damage that has affected cargo, and the protection of other cargo from the peril. *American Mail Line Ltd.* v. *Tokyo Marine Fire and Insurance Co. Ltd.* 270 F. 2nd 499 (9th Cir. 1959); *Asbestos Corp. Ltd. et al.* v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre et al.*, (supra). See also *Propeller Niagara* v. *Cordes* 62 U.S. (21 Howard) 7, 16 L. Ed. 41 (1859); *The Portsmouth* 76 U.S. (9 Wallace) 682, 19 L. Ed 754 (1869); *The Jason* 225 U.S. 32, 54 (1912), 32 S. Ct. 560, 564, 56 L. Ed. 969, 978. *The Guanancita* 69 F. Supp. 928 (S.D. Fla. 1947). Respondent completely failed to meet this obligation. When overheating and fires first occurred in the Matarani cargo, which was given bottom stow since it was the first cargo loaded, the master made no attempt to control the overheating or extinguish the fire with the $CO_2$ system with which the ship was equipped for that purpose. Instead the master adopted other measures, — measures which ultimately proved disasterous. Again, at the Panama Canal, no efforts were made to stabilize the condition in the cargo or in the alternative, to discharge the dangerous cargo as might have been done. COGSA 46 U.S.C. Sec. 1304(6). Instead respondent directed that the vessel proceed from Cristobal for Baltimore with a defective engine and with the cargo so distributed on the hatch covers, that the $CO_2$ system could not be effectively employed. Finally, when the vessel was but an hour from Cristobal and overheating occurred, followed by another fire, the vessel did not return to that port but instead continued with the voyage until the vessel had

to be diverted to Savannah where the voyage was abandoned. Considering the fact that the vessel's fire fighting system could not be used when this last overheating and fires happened, respondent was grossly negligent in not returning to Cristobal. Neither of the courts below made a determination with respect to this contention. Under the facts of the case, respondent is liable for the full amount of the loss of the non-Matarani cargoes. It is submitted that if respondent claims that there should be an apportionment of damage as to the Matarani cargo, the respondent has the burden of making such apportionment. *Schnell* v. *Vallescura* (supra). Respondent having failed to show that the fires which originated in the Matarani cargo were at least most probably the result of an inherent vice, the rule of The Niel Maersk does not apply in any event. Respondent should be held liable for the entire loss and by the same token respondent should not be entitled to recover in general average. *The Irrawaddy* 171 U.S. 187, 18 S. Ct. 831, 43 L. Ed. 130 (1898).

## CONCLUSION

**For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.**

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# APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**Opinion**
66 AD 469

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J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

*Plaintiffs,*

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Defendants.*

---

Appearances:

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GAGLIARDI, *D. J.*

On May 9, 1965, the M.V. Maranon, a cargo vessel owned by the respondent Corporacion Peruana De Vapores

departed Chancay, Peru bound for Baltimore, Maryland. Included in the cargo of the Maranon were approximately 132,000 bags of anchovy fishmeal that had been shipped from various ports in Peru and were destined for Baltimore. When the Maranon was three days out of Chancay overheating developed in some of the sacks of fishmeal that had been loaded at Matarani, Peru and stowed in lower holds two, three and four. Upon the discovery of the overheating, the master of the Maranon ordered certain sacks of the fishmeal placed on deck and others thrown overboard in an attempt to isolate and alleviate the problem.

At the request of her master, the Maranon was boarded by surveyors after her arrival at the Panama Canal Zone on May 13, 1965. The surveyors examined the Maranon's cargo area, taking temperature at points where overheating had been reported. The master elected to proceed with the voyage. However, shortly after the Maranon departed Cristobal, Panama Canal Zone, additional overheating developed and fire broke out in the Matarani fishmeal. On May 18, 1965 the master diverted the Maranon to Savannah, Georgia where the voyage was terminated and General Average was declared.

On May 11, 1966, a libel and complaint was filed against the Maranon by the cargo owners, asserting cargo loss through the fault and privity of the vessel owners and seeking $203,000 in damages. (On May 17, 1966 an amended libel and complaint was filed increasing the prayer for relief to $212,000). On July 31, 1968, respondent filed an answer and counterclaim asserting defenses under various sections of the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 et seq., [hereinafter referred to as COGSA] and under the so-called "Fire Statute," 46 U.S.C. § 182, and seeking $95,-

240.33 in General Average contributions due from Cargo. The action was tried before this court on June 20, 21 and 26, 1972.

Under section 1304(m) of COGSA, 46 U.S.C. § 1304(m), a vessel owner is afforded limited liability for any cargo damage or loss arising from the inherent defect, quality or vice of the goods. Additionally, the extent of a shipowner's liability for cargo damage in the case of fire is clearly delineated by the provisions of section 1304(2)(b) of COGSA, 46 U.S.C. § 1304(2)(b), and by the Fire Statute, 46 U.S.C. § 182. Under these statutes, a shipowner is not liable, beyond General Average, for cargo damage resulting from fire unless caused by the "actual fault or privity" or by the "design or neglect" of the owner. Thus, the shipowner is afforded limited liability for fire damage arising from fault attributable to the master or crew of the vessel as opposed to the personal fault of the owner or its managing officers. *E.g., Consumers Import Co.* v. *Kabushiki Naisha*, 320 U.S. 249 (1943); *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932); *Hershey Chocolate Corp.* v. *The S.S. Robert Lukenbach*, 184 F. Supp. 134 (D. Ore. 1960), *aff'd sub. nom., Albina Engine & Machine Works, Inc.* v. *Hershey Chocolate Corp.*, 259 F. 2d 619 (9th Cir., 1961).

The plaintiffs contend that the damage to the fishmeal cargo aboard the Maranon was not the result of an inherent vice but of improper stowage. In addition, the plaintiffs contend that an erroneous decision to proceed with the voyage beyond Panama resulted in further cargo damage and that the decision was made not by the vessel's master but by her owners. Based upon these contentions, the plaintiffs argue that the owners having supplanted the judgment

of the master for their own, cannot now claim limited liability for the damage that resulted. The facts as we find them do not support the plaintiff's contentions. We conclude rather that the circumstances of this case place it within the scope of the statutes discussed and lead inescapably to a judgment for the defendant shipowner.

**I—The Inherent Vice of the Cargo and Plaintiff's Failure to Prove Condition at the Time of Delivery.**

At the trial of this case, considerable expert testimony was presented with regard to the chemical properties of the cargo. Fishmeal is an organic compound containing a large percentage of highly unsaturated fats. Such substances have a propensity for oxydizing in an exothermic reaction the rate of which increases geometrically, resulting in overheating and eventual spontaneous combustion. The presence of moisture in the air surrounding the fishmeal increases the amount of available oxygen, intensifying the reaction rate and the concomitant overheating process. Thus improper preparation for shipment resulting in latent moisture or improper stowage resulting in poor ventilation may bring about spontaneous combustion in a cargo of fishmeal.

In the case of a cargo subject to damage as a result of latent defects, the burden is on the plaintiff shipper to demonstrate delivery to the carrier in good condition. *Commodity Service Corp.* v. *Hamburg-American Line*, 354 F. 2d 234 (2d Cir. 1965); *Hecht, Lewis & Kahn, Inc.* v. *The S.S. President Buchanan*, 236 F. 2d 627 (2d Cir. 1956); *The Neil Maersk*, 91 F. 2d 932 (2d Cir. 1937). Plaintiff, herein has failed to sustain this burden.

Plaintiff's exhibit 15, a Fishmeal Certificate of Inspection, which was offered as evidence of the condition of the Matarani fishmeal at the time of shipment is clearly insufficient in two respects. First, with regard to technical admissibility, the plaintiff has failed to provide the required foundation for the introduction of the certificate as a business record. Under both the current business records statute, 28 U.S.C. § 1732 and Rule 803(6) of the Rules of Evidence recently approved by the Supreme Court a custodian or other qualified witness familiar with the routine employed in the preparation of the records of the business must testify as a foundation for the introduction of the record in question. The fishmeal certificate was prepared by a firm of cargo surveyors in Peru. Plaintiffs offered the certificate in evidence based solely upon the testimony of one Vincent Walsh, and employee of the H. T. Baker & Brothers, Inc., one of the plaintiff cargo owners. Walsh testified that the certificate was received by Baker & Brothers in the regular course of that company's business. However, no testimony was introduced with respect to the procedures employed in preparing and issuing the certificate. *See United States* v. *Posenstein, et al.*, Crim. Nos. 72-1092, 72-1190 (2d Cir. January 26, 1973).

The second and more substantive insufficiency of the certificate concerns its contents. The certificate is conclusory in nature; it lists the temperature, moisture content and fat content of the Matarani fishmeal and describes the cargo as being "in proper condition for the voyage intended." No information is provided as to how these measurements were taken or as to whether an examination covered possible latent defects of the cargo not apparent

by external observation. In *The Neil Maersk*, the court rejected a similar certificate that had been offered to establish the condition of cargo at the time of shipment stating,

> [T]he certificates of the Exporters Association were surely not competent proof. They were in no way official documents entitled to be received in evidence, and without them there was nothing to show the condition of the fish meal when shipped. *Supra*, 91 F. 2d at 933.

This absence of any competent evidence of the condition of the fishmeal at the time of delivery is emphasized by our finding that the stowage aboard the Maranon was proper. Because of its propensity for spontaneous combustion, fishmeal is customarily stowed in accordance with the so-called "South African Strip" method. Pursuant to this method, bags of fishmeal are stacked with wooden planks between set numbers of bags and canals between the stacks to insure proper ventilation. The stowage aboard the Maranon was within the minimum requirements of the South African Strip method. The plaintiffs contend that, even if the initial stowage of the fishmeal was proper, there was a failure to maintain continuous ventilation. In this regard, the plaintiffs rely upon the absence of any log entries indicating precisely when the Maranon's mechanical ventilation system was started. However, the deposition of the Captain of the Maranon indicates that the ventilation system was put into operation as soon as the first bag of fishmeal was loaded and continued to function properly throughout the voyage. We find that both the stowage and ventilation procedures employed aboard the Maranon were proper in all respects.

**II—The Shipowner Did Not Supplant Its Judgment For That Of The Master**

In addition to their arguments with respect to improper stowage the plaintiffs contend that the management of the voyage after the initial overheating was discovered was improper and was made not by master but by shipowner. The evidence does not support this contention. The plaintiffs' contention is based on two decisions made during the voyage of the Maranon. First, the decision to proceed with the voyage in light of the fact that the Maranon experienced a rupture in the casing of one of her four cylinders before arriving at Cristobal. Despite the damage, the speed of the Maranon was only slightly impaired due to favorable currents and winds on the voyage from Cristobal. We, therefore, find no connection between the damage to cylinder casings and the cargo fire. The second event relied on by the plaintiffs was the decision of the master not to employ $CO_2$ fire extinguishers to control the fire aboard the Maranon. After consideration of the testimony as to the possible effects of the use of $CO_2$ in a fishmeal fire, we cannot conclude that the Master's decision was improper. Moreover, of greater importance than the propriety of the master's decisions to sail from Cristobal and not to use $CO_2$ extinguishers, is the fact that these decisions were made by the ship's master and not by her owner. The communications between the master and the owner do not reflect an attempt by the owner to infringe upon the master's discretion or to supplant his judgment with its own.

By reason of the findings set forth above, we conclude that the fire and resulting cargo damage are not ascriable to any actual fault or privity by the vessel owners and that the defendant is entitled to limited liability under 46 U.S.C. §§ 182, 1304(2)(b) and 1304(2)(m). Accordingly, the defendant is awarded judgment in the amount of $95,240.33 on its counterclaim for General Average contributions due,

to be apportioned as follows: $7,045.10 from plaintiff J. Howard Smith, Inc.; $6,921.04 from plaintiff H.J. Baker & Bro., Inc.; $28,263.63 from plaintiff Wilbur-Ellis Company; $7,417.39 from plaintiff International Porteins Corp.; $30,842.39 from plaintiff Cargill, Inc.; and, $14,750.77 from plaintiff Gloucester By-Products, Inc.

Judgment shall be entered in accordance with the aforesaid opinion.

. . . . . .

U.S.D.J.

Dated: New York, New York
March 21, 1973.

**Judgment**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 AD 496 LPG

#73,346

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

*Plaintiffs,*

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Defendants.*

This action having come on for trial before this Court, Honorable LEE P. GAGLIARDI, United States District Judge,

presiding, and the issues having been duly tried and the Court having thereafter rendered and filed an opinion, dated March 21, 1973, it is hereby

ORDERED, ADJUDGED AND DECREED, that the amended complaint of the plaintiffs herein be and the same is hereby dismissed on the merits and that defendant CORPORACION PERUANA DE VAPORES recover its costs from the plaintiffs herein, and it is further

ORDERED, ADJUDGED AND DECREED, that the said defendant CORPORACION PERUANA DE VAPORES, recover from plaintiffs on the counterclaims which it asserted against them, the following sums, to wit: $7,045.10 from plaintiff, J. HOWARD SMITH, INC.; $6,921.04 from plaintiff H. J. BAKER & BRO., INC.; $28,263.63 from plaintiff WILBUR-ELLIS COMPANY; $7,417.39 from plaintiff INTERNATIONAL PROTEINS CORP.; $30,842.39 from plaintiff CARGILL, INC.; and $14,750.77 from plaintiff GLOUCESTER BY-PRODUCTS, INC., together with interest thereon from July 1, 1968
L P G ~~to February 16, 1969, at the rate of 7¼%, from February~~
L P G ~~16, 1969 to August 31, 1972, at the rate of 7½%, and from~~
L P G ~~August 31, 1972,~~ to date, at the rate of 6%.

Dated: New York, New York
April 11th, 1973

/s/ LEE P. GAGLIARDI
USDJ

Judgment entered Apr 12 1973

THOMAS E. ANDREWS
Acting Clerk

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 822—September Term, 1973.
(Argued April 22, 1974 Decided July 25, 1974.)
Docket No. 73-1921

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

*Plaintiffs-Appellants,*

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Defendant-Appellee.*

Before:

LUMBARD and HAYS, *Circuit Judges*, and
JAMESON, *District Judge.**

Appeal from orders entered in the United States District Court for the Southern District of New York, Lee F. Gagliardi, *Judge*, dismissing libel and complaint by cargo owners against carrier for damage to cargo and granting carrier judgment in counterclaim for contribution in general average.

Affirmed.

* Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

*Appendix B—Opinion of Court of Appeals dated July 25, 1974*

DONALD M. KENNEDY, New York, New York (Donovan, Donovan, Maloof & Walsh, New York, New York, on the brief), *for Plaintiffs-Appellants.*

RICHARD T. O'CONNELL, New York, New York (Healy & Baillie, New York, New York, on the brief), *for Defendant-Appellee.*

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HAYS, *Circuit Judge:*

A group of cargo owners brought this action to recover from the carrier losses incurred when their cargoes of fishmeal caught fire aboard the vessel. The carrier counterclaimed seeking contribution in general average. The district court found the carrier free from fault and therefore dismissed the complaint and granted the carrier judgment on the counterclaim.

We affirm.

In April and May, 1965, the S.S. Maranon picked up some 132,000 bags of anchovy fishmeal at Matarani, Callao, Huacho, and Chancay, Peru, and headed for Baltimore, Maryland. A few days after leaving Chancay the crew discovered overheating in some of the sacks of fishmeal that had been loaded at Matarani. The master of the ship ordered certain sacks placed on deck and others jettisoned in an attempt to isolate and alleviate the problem.

The master contacted the owner, and when the vessel reached Cristobal, Panama Canal Zone surveyors were brought aboard. After the surveyors examined the cargo and reported their findings it was decided that the ship would proceed.

Shortly after leaving Cristobal overheating recurred and fire broke out in the Matarani cargo. The master continued the voyage but then decided to dock in Savannah, Georgia, where the voyage was terminated and general average declared.

To impose liability on the shipowner for the loss suffered to the cargo, the cargo owner must show "design or neglect" or "actual fault or privity" by the carrier. Negligence of the master or the crew will not suffice. 46 U.S.C. § 182 (1970); Carriage of Goods by Sea Act § 4(2)(b), 46 U.S.C. § 1304(2)(b) (1970). Appellants' case does not meet this statutory standard.

If improperly prepared for shipment fishmeal may ignite through spontaneous combustion. The carrier is not liable for damage arising from such inherent defects. Carriage of Goods by Sea Act § 4(2)(m), 46 U.S.C. § 1304(2)(m) (1970). Where cargo has such a propensity for damage due to latent defects the shipper bears the burden of proving delivery to the carrier in good condition. *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind*, 371 F. 2d 537, 539 (2d Cir. 1967); *Commodity Service Corp.* v. *Hamburg-American Line*, 354 F. 2d 234 (2d Cir. 1965). In an attempt to discharge this burden appellants introduced a Fishmeal Certificate of Inspection for the Matarani cargo prepared by a firm of cargo surveyors in Peru. The district court properly found this inadequate in two respects.

First, appellants failed to establish a foundation adequate to bring the certificate within the scope of the "business records" exception to the hearsay rule. 28 U.S.C. § 1732 (1970). In *United States* v. *Rosenstein*, 474 F. 2d 705 (2d Cir. 1973), this court held that the foundation must

be laid by "someone who is sufficiently familiar with the business practice." Id. at 710. We declared that, while the foundation need not be established by one who personally makes or keeps the records, it was insufficient to rely on one who had no direct knowledge of the business practice of the company which kept the records.[1]

Appellants sought to establish the foundation through the testimony of an employee of one of the appellants who was not associated with the Peruvian firm. He had no personal knowledge of how the firm created or kept the records. Thus there was no testimony by "someone who is sufficiently familiar with the business practice" of the record-keeping company, and no adequate foundation was established.

The district court also properly rejected the certificates on the ground that they contained conclusions about the temperature, fat content, and moisture content of the cargo without indicating how such measurements were taken or whether the inspection extended to possible de-

1. See also *Phillips* v. *United States*, 356 F. 2d 297, 307 (9th Cir. 1965), cert. denied, 384 U.S. 952 (1966), where the court found documents inadmissible because "[t]hey were not made in the regular course of the business of the company in whose files they were found. . . ."

*Nichimen Co.* v. *MV Farland*, 333 F. Supp. 691 (S.D.N.Y. 1971), modified on other grounds 462 F. 2d 319 (2d Cir. 1972), does not apply here. The court there held that a clean bill of lading established a prima facie case of delivery in good condition. 333 F. Supp. at 696. The conclusion was mandated by the Carriage of Goods by Sea Act § 3(4), 46 U.S.C. § 1303(4) (1970). That statute does not apply here because the certificate introduced by appellants was not a bill of lading and because section 3(3)(c) of the Act, 46 U.S.C. § 1303(3)(c) 1970, specifically excludes defects which the carrier "has had no reasonable means of checking."

fects not apparent from an internal examination. Had they been admitted there would have been no way for appellees to determine by cross-examination how reliable the records were. Cf. *Aunt Mid, Inc.* v. *Fjell-Orange Lines*, 458 F. 2d 712, 719 (7th Cir.), cert. denied, 409 U.S. 877 (1972). The certificates were not admissible. See *The Neil Maersk*, 91 F. 2d 932, 933 (2d Cir.), cert. denied, 302 U.S. 753 (1937).

As to the non-Matarani cargo there was not even an attempt to prove delivery in good condition. Thus appellants did not sustain their burden as to any part of the cargo.

Appellants claim that appellee failed to maintain proper ventilation of the cargo during the voyage. They relied on the absence of entries in the ship's log indicating when the ship's mechanical ventilation system was started. However, the master of the ship testified that he started the system when the fishmeal was first loaded and continued it throughout the voyage. The conflict in the evidence was for the district court to resolve. Appellants also claim that stowage of the fishmeal was improper. There was ample evidence that the stowage, though not perfect, reasonably complied with the "South African Strip" method. The conclusion that stowage and ventilation aboard the Maranon were proper was not clearly erroneous.

Appellants claim that, even if improper ventilation did not start the fires in the ship, the owners of the ship assumed control from the master when the ship reached the Canal Zone, thereby waiving their protection under 46 U.S.C. §§ 182 and 1304(2)(b), and that they were therefore liable for the results of their negligent decision to

have the Maranon proceed.[2] See *May* v. *Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*, 290 U.S. 333, 344 (1933).

The conclusion of the district court that the master retained control of the ship is not clearly erroneous. The communications between the master and the owner are subject to different interpretations. The master testified that he never relinquished control of the ship. It was the proper province of the district court to resolve any conflicts in the evidence.

Appellants claim that the master was negligent in not using carbon dioxide to extinguish the fires when they first appeared. The negligence of the master, as we have observed, does not give rise to liability of the carrier. Nor does it defeat the claim of the carrier for contribution in general average where the bills of lading include a "Jason" clause, which invokes the right to general average for damage caused by the negligence of the crew or the master. *The Jason*, 225 U.S. 32 (1912). However, the bills of lading in this case did not contain a Jason clause, and the case is therefore controlled by the traditional rule that the ship at fault has no right to general average contribution. *The Irrawaddy*, 171 U.S. 187 (1898); G. Gilmore & C. Black, *The Law of Admiralty* § 5-13 (1957).

However, the district court found that the master was not negligent in declining to use $CO_2$. There was testimony that the gas might condens and cause further damage, and that the gas might condense and cause further damage, and damage to the cargo. We cannot hold the finding of the trial judge clearly erroneous.

Affirmed.

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2. Appellants have apparently abandoned the claim based on the decision to have the Maranon proceed despite a rupture in one of its four cylinder casings before it arrived at Cristobal.

## APPENDIX C

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-1921

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

*Plaintiffs-Appellants,*

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Defendant-Appellee.*

## PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Petitioner-appellants respectfully request the Panel for a rehearing and respectfully suggest of this Court a rehearing in Banc on the following grounds:

1. The Panel by its decision has effected a new construction of the United States Carriage of Goods By Sea Act insofar as it applies to the *prima facie* effect to be given to an ocean bill of lading.

2. The Panel by its decision has altered the application of the "clearly erroneous" doctrine insofar as it applies to a case where the evidence is substantially in the form of depositions and documents.

3. The Panel by its decision extended the application of the "clearly erroneous" doctrine to conclusions of law, more particulary, a determination of negligence.

4. The Panel in its decision overlooked and misconceived petitioners' arguments on appeal all having to do with fault of the defendant which gave rise to or continued the fire on the vessel.

This action arose from fires in cargoes of fishmeal, the propensites of which are known to all parties. While the shipper is obligated to deliver the cargo to the ship in good order and condition with a certificate verifying such condition, the carrier is thereafter bound during its transportation by sea, to give it that care which the particular cargo requires for its safe transportation and the safe transportation of all other cargo then on board.

The trial court found that fire originated in the Matarani cargo and this finding was upheld by the Panel. The only evidence as to the cause of fires in other cargoes was that they were precipitated by the Matarani cargo fires. The Panel erroneously concluded that there could be no recovery for the other cargo because no attempt was made to show good order and condition of these other cargoes. In a footnote at page 4974 of the opinion it was said that the United States Carriage of Goods By Sea Act (1936) 1303 (4) was not applicable because bills of lading for these cargoes were not introduced by appelants. Such documents were not reproduced in the Appendix but they were received in evidence upon the trial as plaintiff's exhibits 1 and 2 (App. 56a, 57a). On the basis of the holding in *The Katingo Hadjipatera* (S.D.N.Y. 1948) 81 F. Supp.438, modified on other grounds and affirmed (2 Cir. 1952) 194

F. 2d 449 the bills of lading proved the actual good order and condition of all but the Matarani cargo upon shipment. The Panel also in the same footnote held that the provision for the "prima facie" effect to be given a bill of lading did not apply to ". . . defects which the carrier 'has had no reasonable means of checking' " (referring in part to 1303(3)(c)).

This holding is faulty in that it erroneously premised upon a misreading of the act. The sentence from which it was taken reads in its entirety:

> "Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any *marks, number, quantity or weight* which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he *has had on reasonable means of checking.*" [emphasis added]

The above provision, then, was quoted out of context for it permits the carrier to *decline to show in the bill of lading marks, number, quantity or weight which he has no reasonable means of checking.* If the construction sought to be given to the section by this Panel is to stand, then the carrier could readily avoid the *prima facie* effect required of any bill of lading because a carrier rarely if ever has an opportunity to inspect or check the contents of packages given to it for transportation. Indeed, if one were to encourage such internal inspection the opportunity for theft, damage and the like in ocean transportation would undoubtedly result in an unwarranted proliferation of litigation.

The Panel in reviewing certain findings of the trial court held that they were not clearly erroneous. The record

shows, however, that the evidence at trial was substantially in the form of depositions and documents. This Court has held that under such circumstances the "clearly erroneous" rule is not determinative of the correctness of the trial court's findings of fact. *J. Gerber & Co.* v. *S.S. Sabine Howalt, et. al.*, (2 Cir. 1971) 437 F. 2d 580. Furthermore, certain critical testimony relied upon by both the trial court and this Court came from the vessel's master who had on four occasions reported the existence of a fire and who subsequently reported the outbreak of *another* fire and who yet contradicted himself under oath, albeit via deposition, and denied the existence of such earlier fire. *That such earlier fire had in fact occurred was never disputed for the parties stipulated to its existence in the pre-trial order (App. 25a). It was also reported in the vessel's log* (Ex. Vol.374).

The master said he ventilated as he was required to do. Both tribunals accepted his testimony in spite of the fact that his log did not support him.

The defendant claimed that the master remained in control of the vessel at all times. In support of this contention it rested solely on the self serving testimony of the master. This testimony was refuted by messages exchanged contemporaneously with the events. Particular reference is made to plaintiff's exhibits G-1 and L-1, L (Ex. Vol. 472a, 473a, 483a) which establish beyond question that the owner exercised control both upon the interruption of the voyage at Panama and its resumption. It is respectfully submitted that a consideration of the entire record does not support the findings of fact made by the trial court and upon which the Panel based its affirmance.

The Panel held that the determination of the trial court that the master was not negligent in failing to use $CO_2$ to

extinguish the fire was not clearly erroneous. However, a determination of negligence is a conclusion of law rather than a finding of fact and is not governed by the "clearly erroneous" doctrine. *J. Gerber & Co.* v. *S.S. Sabine Howalt et al., supra.* In any event, the holding that the master was not negligent on this ground for the reason that its use would have caused further damage is untenable. On the questionable ground that condensation might have occurred in the burning cargo, the master did not use the means at hand to put the fire out. His duty to protect the cargo had been breached. *American Mail Line Ltd.* v. *Tokyo Marine and Fire Ins. Co. Ltd.* (9 Cir. 1959) 270 F. 2d 499, 501 cited with approval in, *Asbestos Corp. Ltd., et al.,* v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre et al.,* (2 Cir. 1973) 480 F. 2d 669, 672.

The vessel was equipped with a $CO_2$ fire extinguishing system, a standard type of fire-fighting equipment for such cargo and indeed in some instances mandated for the carriage of fishmeal by regulation. 46 C.F.R. Sec. 146.27-100 which in turn refers to 46 C.F.R. Sec. 146.27-27(b)(2) provides that if fishmeal is carried in bulk it must be carried in a vessel having "an approved carbon dioxide fire extinguisher system". It should be noted also that a year earlier under similar circumstances the same defendant had successfully used $CO_2$ to combat a fishmeal fire in one of its vessel (Pl. Ex. 14 Putumayo General Average, Ex. Vol. 434-442).

It is evident that the trial court and the Panel misunderstood and overlooked appellants' arguments relating to defendant's fault as giving rise to or continuing the fires in the cargoes, particularly upon and after the vessel's departing Panama. The Panel at page 4976 correctly con-

cluded that the bills of lading in this case did not contain a Jason Clause, and that thereby if the ship was at fault the owner had no right to contribution in general average. It was not established at trial that the fires occurred because of an inherent vice of the Matarani cargo in which fires originated.

In addition to the contention that the master was negligent in not using $CO_2$, appellants also contended that under the known circumstances the voyage should not have been continued with a damaged engine, which impaired the vessel's speed by between 15 to 20%, an essential consideration in the carriage of fishmeal. This contention was not abandoned as suggested in the footnote at page 4975 of the decision. On the contrary at page 24 of its principal brief on this appeal appellants, in reference to the dereliction of the owner said: "it knew that the vessel had sustained engine damage which could not but substantially reduce her speed and that dispatch was an element in the carriage of fishmeal particularly fishmeal which has a tendency to overheat." On the same page in reference to the dereliction of the master appellants said: "he also knew that his vessel's speed would be reduced from 2 to 2½ knots or by between 15 to 20%." This knowledge of the owner and the master is indicative of a total lack of concern for the care of the cargo. The reduction in speed also directly contributed to the loss for according to the evidence additional fires broke out shortly after the vessel arrived at Savannah, the port of refuge. Had the vessel arrived a day or two earlier it would, but for the deficiency in speed, have been able to safely discharge the sound cargo.

An additional argument of appellant one which was not passed upon by the trial court and which was not considered

by the Panel, and which remains undecided, concerns the question of whether the owner and/or the master were negligent in not returning the vessel to Panama when within hours after sailing from that port, further overheatings and fires were found in the cargoes.

WHEREFORE, petitioners-appellants respectfully pray that the Court grant the relief sought herein and permit reargument and suggested in banc review.

Respectfully submitted,

DONOVAN, DONOVAN, MALOOF & WALSH
*Attorneys for Petitioners-Appellants*

DONALD M. KENNEDY
FRANCIS J. MCCAFFREY
*Of Counsel*

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 822 September Term 1973
(Argued April 22, 1974 Decided September 3, 1974

Docket No. 73-1921

J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

*Plaintiffs-Appellants,*

—against—

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Defendant-Appellee*

Before: Lumbard and Hayes, Circuit Judges, and Jameson, District Judge.*

Petition for rehearing on a decision of this Court rendered on July 25, 1974, affirming orders entered in the United States District Court for the Southern District of New York, Lee F. Gagliardi, *Judge*, dismissing libel and complaint by cargo owners against carrier for damage to cargo and granting carrier judgment in counterclaim for contribution in general average.

Petition granted in part and opinion modified.

* Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

*Appendix D—Order of Court of Appeals dated September 3, 1974 granting rehearing in part modifying its opinion and further subsequent modification*

PER CURIAM:

By an opinion dated July 25, 1974, this Court affirmed a judgment entered in the United States District Court for the Southern District of New York. Appellant has now petitioned for a rehearing on our order.

We grant the petition for rehearing and modify our opinion by deleting the second paragraph of footnote 1. In all other respects we adhere to our original decision.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

United States Courthouse
Foley Square
New York 10007

A. DANIEL FUSARO
Clerk

Smith v. S.S. Maranon

Docket No. 73-1921 Decided July 25, 1974

In Judge Hays' opinion in the above-entitled case the following changes have been made:

Page 4971, line 22—delete "Lee F." and insert "Lee P." in place thereof.

Page 4976, line 16—delete "gas might condense and cause further damage, and" and insert "conduct of the crew and captain actually minimized" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hd

## APPENDIX E

## UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of York, on the twenty-fourth day of December, one thousand nine hundred and seventy-four.

73-1921

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J. HOWARD SMITH, INC., J. H. BAKER & BRO., INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC., and GLOUCESTER BY-PRODUCTS, INC.,

*Plaintiffs-Appellants,*

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Defendant-Appellee.*

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiffs-Appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ WILFRED FEINBERG
*Acting Chief Judge*
Wilfred Feinberg

## APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-418

J. HOWARD SMITH, INC., ET AL.,

*Petitioners*

—against—

S. S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES

**Order Extending Time to File Petition for Writ of Certiorari**

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 1, 1975.

/s/ THURGOOD MARSHALL
*Associate Justice of the Supreme Court of the United States*

Dated this 20th day of November, 1974

*Appendix F—Two orders of the Supreme Court dated November 20 and December 23, 1974 granting extension of time to petition for writ of certiorari*

SUPREME COURT OF THE UNITED STATES

No. A-418

J. HOWARD SMITH, INC., ET AL.,

*Petitioners*

—against—

S. S. MARANON, ETC., ET AL.

**Order Further Extending Time to File Petition for Writ of Certiorari**

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including January 31, 1975.

/s THURGOOD MARSHALL
*Associate Justice of the Supreme Court of the United States*

Dated this 23rd day of December, 1974

# APPENDIX G

28 U.S.C. § 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1333. ADMIRALTY, MARITIME AND PRIZE CASES

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

46 U.S.C. § 182. LOSS BY FIRE.

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S. § 4282.

46 U.S.C. § 1303. RESPONSIBILITIES AND LIABILITIES OF CARRIER AND SHIP—SEAWORTHINESS

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

CARGO

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

CONTENTS OF BILL

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any

marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

BILL AS PRIMA FACIE EVIDENCE

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81-124 of Title 49.

GUARANTY OF STATEMENTS

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

NOTICE OF LOSS OR DAMAGE; LIMITATION OF ACTIONS

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill

of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"SHIPPED" BILL OF LADING

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the

"shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

LIMITATION OF LIABILITY FOR NEGLIGENCE

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.

46 U.S.C. § 1304. RIGHTS AND IMMUNITIES OF CARRIER AND SHIP—UNSEAWORTHINESS

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted

from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

UNCONTROLLABLE CAUSES OF LOSS

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

FREEDOM FROM NEGLIGENCE

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

DEVIATIONS

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of

loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

AMOUNT OF LIABILITY; VALUATION OF CARGO

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently mistated by the shipper in the bill of lading.

INFLAMMABLE, EXPLOSIVE, OR DANGEROUS CARGO

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be

landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

## FEDERAL RULES OF CIVIL PROCEDURE

### RULE 52. FINDINGS BY THE COURT

*(a) Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessery on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

SUPREME COURT, U. S.

FILED

FEB 10 1975

MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

**October Term, 1974**

**No. 74-909**

J. HOWARD SMITH, INC., J. H. BAKER & BRO. INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC. and GLOUCESTER BY-PRODUCTS INC.

*Petitioners,*

*v.*

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### Statement of the Case

This case involves damage to a cargo of bagged fishmeal caused by fire. It was tried in the United States District Court for the Southern District of New York. The Trial Judge found no liability to rest on the part of the Respondent-vessel owner for damage to the cargo since it was occasioned by fire. The Court allowed Respondent-vessel owner to recover from the Petitioners sums due from them as cargo owners in General Average.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court in all respects. Additionally, that Court subsequently denied a Petition for Rehearing and a Suggestion for Rehearing In Banc. The opinion of the Court of Appeals is reported at 501 F. 2d 1275. The opinion of the Trial Judge is not officially reported.

## Events of the Voyage Which Were Established at Trial

The S.S. MARANON, which was owned by Respondent, loaded about 132,000 bags of fishmeal at four different ports in Peru. It was contemplated that the vessel would proceed via the Panama Canal to Baltimore, Maryland. Because of fires which developed in the cargo during the voyage, the vessel diverted to Savannah, Georgia, where the voyage was terminated and General Average declared by Respondent as vessel owner.

On the third day out of her last loading port in Peru and prior to her arrival in the Canal Zone area, the vessel experienced overheating and/or fire in some of her cargo. This was handled at sea and the Master caused several bags to be placed on deck while some were thrown overboard. Later, the vessel stopped in the Canal Zone, calling first at Balboa and then at Cristobal.

She was boarded by surveyors who examined the cargo and checked temperatures. The Master then decid'd to sail for Baltimore, having been personally satisfied that the existing conditions warranted this action and having in mind the safety of the crew, the vessel and the cargo. Trindade Dep., Ex. Vol. pp. 26-27. As it developed, additional overheating and fires broke out in the cargo after the vessel departed from Cristobal and in light of conditions then encountered, the Master determined that he could not reach Baltimore safely. He thereupon diverted to Savannah, where the cargo was discharged and the voyage terminated. Pre-Trial Order, App. pp. 24a-25a.

## The Questions Presented by Petitioners do not Pose Issues of Federal Law to be Settled by This Court.

Petitioners' first question asks if a cargo owner is deprived of the prima facie effect afforded to a clean bill of lading where an inherent defect or vice of the goods may have caused damage. The question, as stated, is not relevant to the issues in this case, because Respondent interposed a defense of "fire". It offered proof

that the cargo had been properly ventilated and that fire and overheating which originated in the cargo had caused the damage. An issue concerning the internal condition of the cargo within the bags and its fitness for carriage was thus raised, especially since the cargo was subject to spontaneous combustion. The Trial Judge and the Court of Appeals in this case, citing cases in support thereof, held that where an inherent defect or vice of the goods is an element of the case, the cargo owner must prove that the cargo was in *actual* good order when shipped. There isn't any conflict concerning this rule in the decision of the Court of Appeals in this case because the Trial Judge and the Court of Appeals were satisfied, based on the facts, that the cargo was damaged by fire from an internal cause within the fishmeal and not from an *external* one.

Petitioners, in posing question 1, seek to circumvent the fact that Respondent established that the damage to cargo came about by reason of fire and they omit noting the burden of proof which falls upon a cargo owner in a "fire" case. The Trial Judge and the Court of Appeals concluded that Respondent was not liable to the Petitioners by reason of the provisions of the Fire Statute, 46 U. S. C. 182, and the provisions of the U. S. Carriage of Goods by Sea Act, 46 U. S. C. 1304(2)(b). Under these statutes a vessel owner is not liable for damage to cargo caused by fire unless the fire was caused by the "design or neglect" or by the "actual fault or privity" of the owner.

Question 2 which the Petitioners present contains erroneous statements of fact, which renders it unworthy of consideration. The certificate to which Petitioners refer was prepared by the shippers, not by the Respondent. The latter had no role in its preparation nor did it have knowledge about the actual condition or fitness of the single lot of cargo to which the certificate referred.

Petitioners' question 3 seeks to imply that the provisions of the statutes cited therein were misinterpreted by the Trial Judge and by the Court of Appeals. They suggest that both Courts

ruled that Respondent was not required to use reasonable efforts to prevent aggravation of damage. It hardly need be said that there were no rulings of that nature in this case. Moreover, the Trial Judge found that all reasonable steps had been taken on board the vessel to protect the cargo. His finding was accepted by the Court of Appeals which took occasion to note in its opinion that the conduct of the crew and captain actually minimized the damage.

In presenting question 4, Petitioners quite clearly are seeking to have this Court review findings of fact made by the Trial Judge. The question does not present an issue of law, but it does contain an erroneous statement in alleging that the Trial Court made a finding of fact which was inconsistent with a fact upon which the parties had stipulated. The alleged inconsistency refers to a choice of words which were used to describe the condition of part of the cargo before the vessel arrived at Balboa. The words involved are "fire" and "overheating". In describing the condition of the cargo during the stage of the voyage mentioned, the parties had referred to "fire", whereas the Trial Judge used the word "overheating". The outcome of the case was not altered thereby.

## The Petition Contains Certain Inaccuracies.

In their Petition, Petitioners stated in a number of places that the Respondent directed the Master of the vessel to continue the voyage after the vessel had stopped in the Canal Zone. This is not a correct statement. Petitioners raised this issue at trial and in the Court of Appeals, but it was resolved against them, the Courts having determined that the Master made the decision to proceed. Additionally, they concluded that his judgment in this regard was not supplanted by Respondent. Thus, Petitioners are not in a position to state to this Court, without reservation, that Respondent directed the Master to proceed with the voyage from the Canal Zone.

Petitioners' Statement of the Case contains certain other unsupported contentions which warrant comment. Petitioners suggest to this Court that there was error on the part of the

Court of Appeals in making an additional finding in this case. There was, however, no additional finding made. Petitioners base their contention on a step taken by the Court of Appeals to correct a printing error. The error did not appear in the original typewritten opinion of the Court of Appeals, dated July 25, 1974. The printed copy disclosed a repetition of words reading:

> "There was testimony that the gas might condens [sic] and cause further damage, and that the gas might condense and cause further damage, and damage to the cargo." (Appendix to Petition, p. B-6).

A correction was subsequently made in a memorandum issued by the Clerk of the Court of Appeals. The printing error was corrected—words which had been repeated were deleted and words which had been omitted were added. The following words which were used in the typewritten opinion were restored to complete the sentence:

> "conduct of the crew and captain actually minimized" [damage to the cargo]. (Appendix to Petition, p. D-2).

Another inaccuracy appears in the Petition. Petitioners, in suggesting that the Court of Appeals should have interpreted the evidence in a light favorable to them and ruled that the findings of the Trial Judge were erroneous, have stated that the evidence presented at trial was substantially in the form of depositions and documents. This was not so and the record discloses that in this case, only two (2) depositions were offered at trial, whereas six (6) witnesses testified personally before the Trial Judge.

## Petitioners Seek to Have This Court Consider Findings of Fact.

Petitioners suggest to this Court that there are questions of law which involve conflicts between the Court of Appeals for the Second Circuit and the Courts of other circuits, but their Petition reveals that they seek to have this Court consider Findings of Fact.

Although there are others, three comments which are made in the Petition and which are cited at random, illustrate that Petitioners continue to dispute findings of fact in this case.

(1) Referring to the finding of the Trial Judge that the decision of the Master not to employ the vessel's $CO_2$ equipment was not improper, Petitioners state:

"This finding was unsupported * * *". (Petition, p. 8).

(2) Referring to the testimony of the Master concerning proper ventilation of the cargo, testimony which was accepted by the Trial Judge, Petitioners state:

"His own messages as well as his log contradict him". (Petition, p. 20)

(3) Referring to the finding of the Trial Judge that Respondent did not take over control of the vessel from her Master and direct the vessel to proceed from the Canal Zone, Petitioners state:

"The determination was based on the unsupported testimony of the master . . . It cannot be disputed that the master was an interested witness and his testimony standing alone can hardly be considered of sufficient weight to overcome the other evidence which demonstrated that respondent had intervened, and that the master acted only after receiving instructions from respondent." (Petition, p. 20)

## Certain Cases Cited by Petitioners Are Not Relevant.

Petitioners cite *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind*, 371 F. 2d 537 (2d Cir. 1967). That case did not involve a defense based upon "fire" and for that reason it is not relevant, since the burden of proof is different in a "fire" case. Apart from that, however, the case is not relevant since the proof established that the damage involved was caused by the carrier's negligence. The Court concluded that since the carrier's negligence was established, the shipper was not required to offer

direct evidence that the cargo was in good order and condition when shipped. Here, proof of the carrier's negligence was not established. On the contrary, the damage was shown to have been caused by fire.

Petitioners also cite *Brown & Williamson Corp.* v. *the S.S. Anghyra,* 157 F. Supp. 737 (E. D. Va. 1957) reversed in part, 277 F. 2d 9 (4th Cir. 1960) (cert. denied 364 U. S. 879), as illustrating an alleged conflict between circuits concerning burden of proof in an "inherent vice" case. Damage to tobacco by heat was involved and the trial judge outlined in detail how the cargo had been processed and baled prior to shipment. The Court considered the vessel owner to have the burden of establishing damage caused by inherent vice, but apart from this the Court found that the damage was caused by heat during the voyage, for which the vessel was responsible. The District Court's decision, on the cause of damage, was reversed by the U. S. Court of Appeals for the 4th Circuit in *Hellenic Lines Ltd.* v. *Brown & Williamson Corp.,* 277 F. 2d 9 (4th Cir. 1960) (cert. denied 364 U. S. 879). That Court found, upon the facts, that the vessel owner had taken proper steps to protect the cargo from overheating and it concluded that the District Court ". . . was in error in holding the ship responsible for the heat damage to the cargo". (at p. 15). Thus, the case is not relevant here.

Petitioners cite *United States* v. *Central Gulf Steamship Corporation,* 340 F. Supp. 473 (E. D. La. 1972). Again, that case did not involve a defense based upon "fire". Moreover, no conflict is shown since the Court merely stated that where a carrier proves, in the first instance, that loss was due to an excepted cause, the shipper then has the burden of proving the carrier's liability. In this case "fire" was shown by Respondent to have been the excepted cause. Thus, even under the rule mentioned in the case cited, Petitioners have the burden of proving liability of the carrier.

*States Marine Corp. of Del.* v. *Producers Coop. Packing Co.,* 310 F. 2d 206 (9th Cir. 1962) is also cited in the Petition. Petitioners rely on it to support their contention that a conflict exists between Courts about the interpretation to be given to

*The Niel Maersk*, 91 F. 2d 932 (2d Cir. 1937) (cert. denied 302 U. S. 753). This case does not reveal any conflict as demonstrated by the Court's comment that the trial court's opinion "adequately distinguishes the Niel Maersk case", p. 209.

## The Decision of the Court of Appeals Does not Present a Conflict as Petitioners Contend.

Petitioners contend that the prima facie effect of a clean bill of lading has been changed by the Court of Appeals. They take the position that in this case the Court of Appeals went beyond what it had held in *The Niel Maersk, supra.* However, this is not the case and Petitioners are really seeking to overcome the burden of proof which was theirs. The general rule was noted by the Trial Judge (Appendix to Petition, at p. A-4), and by the Court of Appeals (Appendix to Petition, at p. B-3). Both Courts stated that in instances where the cargo may have an inherent or latent defect, the cargo owner must show delivery to the carrier in good condition.

Petitioners' legal position, whether it involves burden of proof, prima facie effect of clean bills of lading, or apportionment of damages, is predicated upon a false premise, or assumption, i.e., that some fishmeal was damaged from external causes. Neither the Trial Judge nor the Court of Appeals so found and the statement that some of the cargo was "admittedly damaged by external causes" (Petition, p. 10) is completely inaccurate.

Petitioners argue that the Court of Appeals for the Second Circuit does not give proper legal effect to clean bills of lading in cases where damage may have been due to external causes. The argument is contradicted by that Court in *Tupman Thurlow Co., Inc.* v. *S.S. Cap Castillo*, 490 F. 2d 302 (2d Cir. 1974). There, the Court noted that:

> "Where * * * the external appearance of cargo is probative of the condition of the goods, clean bills of lading are evidence of good condition. * * *" (Footnote 2, at p. 305).

Petitioners, in presenting their legal argument, do not take into account that the cargo was damaged by fire. Thus, they avoid taking issue with a fundamental point of law which is involved in the case. The point involves burden of proof in a case where, as here, Respondent's principal defense was "fire", based upon its freedom from liability under the provisions of the Fire Statute, 46 U. S. C. 182, and the Carriage of Goods by Sea Act, 46 U. S. C. § 1304(2)(b). Concerning these Statutes, the Court of Appeals referred to the burden which Petitioners did not meet in this case. The Court stated:

> "To impose liability on the shipowner for the loss suffered to the cargo, the cargo owner must show 'design or neglect' or 'actual fault or privity' by the carrier. Negligence of the master or the crew will not suffice. * * * Appellants' case does not meet this statutory standard." (Appendix to Petition, p. B-3).

The Respondent came forward with evidence at trial showing that the cargo was damaged by fire. At that stage, the burden was on the Petitioners to show that the fire was caused by the "design or neglect" or "actual fault of privity" of the Respondent. Since the cargo was susceptible to spontaneous combustion, Petitioners, having the burden, should have offered evidence to show the true condition of the cargo at the time of loading. Although several lots of fishmeal were involved, Petitioners elected to offer one certificate into evidence, allegedly to show the condition of one lot. Petitioners offered no evidence at all with respect to the alleged fitness of the remaining lots.

## The Certificate Did Not Prove Fitness.

Among other cases, the Trial Judge and the Court of Appeals relied upon *The Neil Maersk, supra.* In that case, carriage of fishmeal was also involved, and the District Court had found ventilation to have been improper, whereas in this case, both ventilation and stowage were found to be adequate. In *The Niel Maersk*, the cargo owner, like Petitioners here, had failed to prove the actual condition of the fishmeal at the time of ship-

ment. It sought to rely on a certificate which the Court ruled was insufficient. The Court of Appeals stated as follows:

> "Assuming that the findings of the District Court as to stowage and ventilation and as to the condition of the meal when delivered were correct, we differ with the result it reached because there was no proof that the meal when shipped was merchantable or in a condition fit for transportation. Indeed, we find no competent proof in the record as to what was its condition. The tendency of fish meal to deteriorate depends on whether it contains an excess of moisture or oil. There was no proof whatever as to the oil content of the bags, and the only attempt to prove the water content was by the certificates by the Fish Meal Producers & Exporters Association of Japan. That association certified the moisture content at 9.29 per cent, which, according to the testimony of Manning who seems to have been the most disinterested and credible witness on the subject, was above the water content proper for transportation. But the certificates of the Exporters Association were surely not competent proof. They were in no way official documents entitled to be received in evidence, and without them there was nothing to show the condition of the fish meal when shipped. The recitals of 'apparent good order and condition' in the bills of lading furnished only prima facie proof of the external condition of the bags. But the external condition would not show whether the contents were potentially subject to decay or had begun to heat up or deteriorate owing to excess of moisture or other causes such as excess of oil." at p. 933.

The matter of offering evidence in the form of certificates relating to the fitness of cargo was also considered by the U. S. Court of Appeals for the Seventh Circuit in *Aunt Mid. Inc.* v. *Fjell-Oranje Lines, et al.*, 458 F. 2d 712 (7 Cir. 1972) (cert. den. 409 U. S. 877). In that case, certificates had been issued by a department of the Dutch Government, indicating that a cargo of Danish cabbage had been examined and found to be substanially free from disease and pests. In stating that the certificates had properly been excluded, the Court stated:

> "This was not a situation where a certificate recorded a purely factual matter, such as the number of bags of

> cabbage, whether they [sic] were any objective visual evidences of bruising or other damage to the cabbages, or even that the shipment was in apparent good condition. Here, the 'truth' which [Plaintiff] wanted in evidence was an opinion that the cabbages were free of injurious diseases. In view of the testimony of the nature of the particular diseases attacking the cabbages, it appears clear that something more than a mere routine visual examination or inspection would have been required to support the opinion. The district court correctly pointed out that the piece of paper could not be cross-examined, and the inspector could not be." at p. 719.

Petitioners failed in their attempt to show fitness of one lot of fishmeal at the time of loading. They made no attempt at all to offer any proof concerning the other lots. Additionally, they failed to prove that the fire on board the MARANON was caused by the "design or neglect" or "actual fault or privity" of Respondent. Their attempt to convince this Court that an important question of federal law is involved which should be settled by this Court is without substance.

## CONCLUSION

**It is respectfully submitted that for the foregoing reasons the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit should be denied.**

Respectfully submitted,

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S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Respondents.*

## PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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## ADDITIONAL AUTHORITIES CITED

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*Respondents.*

## PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

The confusion which has permeated this case is exemplified by respondent's brief in opposition. The argument therein presented is based on the assumption that the rule of the Second Circuit is the controlling law to be applied when a carrier alleges that because of the nature of the cargo, inherent vice may have been the cause of the damage. Thus respondent maintains that in considering the defense of the fire exemptions alleged by the carrier under 46 U.S.C. Section 182 and 46 U.S.C. Section 1304(2)(b) the lower courts properly imposed as a prerequisite to petitioners' case that they establish the actual order and condition of their respective cargoes by evidence independent of the bills of lading. Respondent has said that this does not involve a federal issue. However, there remains the initial question of whether the Second Circuit rule as projected in this case

is a proper limitation on the provisions of the Carriage of Goods by Sea Act and general maritime law. From the error into which the courts below have fallen in expanding the Second Circuit's rule and the confusion which has resulted as shown by respondent's brief, it would appear that the courts of the Second Circuit in the course of developing this rule would have been well advised to have given due consideration to the admonitions set forth in the paper which was delivered by Max Radin to the Conference of Judges of the Ninth Circuit as reported in 32 Cornell Law Quarterly (1946-47) at page 137 under the title, "The Trail of the Cal f."

In holding that the petitioners had to establish in each instance the good order and condition of their respective cargoes by evidence beyond the bills of lading, the lower courts so attenuated the probative value of petitioners' evidence as to foreclose petitioners from establishing that respondent was at fault with respect to the fires; that respondent failed to protect the cargo and prevent aggravation of the damage once the dangerous condition was discovered, and that respondent and its agents and employees including the master were at fault with respect to the general average incident, to wit: the fires.

In view of the position taken by both lower courts, it would have been surprising indeed if petitioners had prevailed on any of these contentions, since the rejection of the bills of lading preordained the decision that was arrived at. If, on the other hand, the bills of lading had been given the significance required by the Carriage of Goods by Sea Act, then in applying maritime law the petitioners should have prevailed for the preponderance of evidence established that respondent was liable for the damage. Respondent's contention that it was not responsible for the fires or that it had not assumed control at the Canal rested almost entirely

upon the testimony of the master, which was the only evidence that was referred to by the lower courts. In this regard, it is respectfully called to the Court's attention that the Court of Appeals in considering the evidence commented that the messages which were interchanged among respondent, its agents and the master were subject to different interpretations which the District Court was required to resolve.

Similarly, if the bills of lading had been accepted, the lower courts would not have summarily disposed of petitioners' contention that respondent was liable for the failure to properly protect the cargoes and prevent aggravation of the damage after the imminent peril had been discovered. The only findings in support of respondent's case in this regard was that of the District Court that the master was not negligent in failing to employ the $CO_2$ system on the ground that there was testimony that the use of carbon dioxide might cause condensation. The Court of Appeals in accepting this finding added that there was testimony that the conduct of the crew and captain had actually minimized damage. The testimony with regard to the finding and this conduct was taken out of context and given a meaning which neither of the witnesses intended. See Petition, pages 8 and 9.

Finally, with respect to respondent's counterclaim for general average contributions, as pointed out by the Court of Appeals the right to this relief depended upon whether or not respondent or its agents and employees were negligent in creating the general average incident. Notwithstanding the fact of the absence of entries for ventilation in the ship's log, the District Court accepted the master's testimony and held that the cargo had been adequately ventilated. The Court of Appeals, acknowledging the con-

flict in the evidence, affirmed the finding with the comment that it was for the District Court to resolve.

There are three additional matters referred to in respondent's brief which require clarification. The first deals with the question of whether or not fires first occurred before the Canal Zone. Respondent who had been advised of pre-Canal Zone fires, directed that a surveyor examine the cargo when the ship arrived in the Canal. However, the surveyor employed (Mr. Beech) was not advised of these fires. Accordingly, his examination of the cargo was limited to the taking of temperatures. He testified that if the fires had been reported, an entirely different procedure would have been adopted and that pursuant to Canal Zone law the fire brigade would have boarded the ship and insisted on clearing it. Such fires, he said, should have been reported to the Canal Zone authorities (326 line 16 to 331 line 23). Thus, the determination of when the ship first experienced fires is critical in assessing both respondent's and the master's conduct at the Canal Zone.

The second concerns the application of the "clearly erroneous" rule. Respondent has referred to the fact that six witnesses testified in person at the trial and only two depositions were offered. Of these, six witnesses however, two were experts, one of whom testified concerning the chemical properties of fishmeal generally, and the other gave evidence concerning stowage and care of fishmeal cargo. The remaining four were fact witnesses. One testified concerning the general average adjustment. Another testified concerning cargo damage and crew activity at Savannah. The third testified concerning the origin of the certificate of inspection for the Matarani cargo. The fourth testified as to activity at respondent's home office during the course of the voyage which in the main concerned re-



had been put in evidence by respondent. Substantially all of the evidence dealing with the events that occurred during the voyage was contained in the depositions of the master and respondent's surveyor Leech as well as in the documentary evidence consisting principally of documents introduced by respondent.

Finally, it is noted that the respondent's brief in opposition elected to ignore the fact that although there were 16 separate shipments involved herein, the courts below found that the fires and overheatings originated in only one of them. By doing so, respondent attempts to explain the lower courts' requiring all petitioners to meet the same degree of proof regarding the pre-shipment condition of their respective cargoes, in spite of the holding to the contrary in the *American Tobacco Co.* v. *The Katingo Hadjipatera* 81 F Supp. 438. Respondent would have it inferred that both courts found that all the cargoes became damaged as the result of an internal rather than an external cause, and thereby justify the unwarranted extension of the Niel Maersk doctrine to the 15 non-Matarani cargoes.

It is clear then that the fundamental issue in this case is the effect to be given an ocean bill of lading for the purpose of allocating between carrier and cargo owner their respective rights and liabilities. If the decision is allowed to stand, then in any case where because of the nature of the cargo the defense of inherent vice is alleged, the provisions of COGSA will be negated regardless of how the damage in fact came about. Thus, even if the Second Circuit's rule was not criticized by other circuits, but rather was universally adopted as the desired interpretation of the Carriage of Goods by Sea Act and the general maritime law, the question would still require final resolution by this

Tribunal. The purpose of the Hague Rules from which the U.S. COGSA evolved was to attain uniformity in international transportation by sea. As an esssential part of that scheme the *prima facie* integrity of a clean bill of lading as a commercial document must be preserved; otherwise, chaos in international trade will ensue.

## CONCLUSION

**For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.**

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